REEBOK (M) SDN BHD v. CIMB BANK BHD

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
YEOH WEE SIAM JCA
HANIPAH FARIKULLAH JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-2459-12-2017]
14 AUGUST 2018

CIVIL PROCEDURE: *Striking out – Application for – Application to strike out wound up company's appeal – Whether appeal sanctioned by official liquidator – Whether sanction given without any caveat by liquidator – Whether irregularities may be cured by order of court – Whether appeal to Court of Appeal from original jurisdiction of High Court is one of right – Whether courts ought to be slow in depriving prospective appellant in exercising constitutional and statutory right of appeal – Whether Companies Act 1965 contain provisions to deprive appeal to Court of Appeal – Companies Act 1965, s. 236(2)(a)*

CIVIL PROCEDURE: *Appeal – Right of appeal – Whether appeal sanctioned by official liquidator – Whether sanction given without any caveat by liquidator – Whether irregularities may be cured by order of court – Whether appeal to Court of Appeal from original jurisdiction of High Court is one of right – Whether courts ought to be slow in depriving prospective appellant in exercising constitutional and statutory right of appeal – Whether Companies Act 1965 contain provisions to deprive appeal to Court of Appeal – Companies Act 1965, s. 236(2)(a)*

The respondent ('applicant'), by way of encl. 7, had filed a notice of motion to strike out the appellant's appeal solely on the ground that there was no sanction by the official liquidator. The applicant relied on s. 236(2)(a) of the Companies Act 1965 ('CA'). The appellant was wound up and it was subsequent to the commencement of proceedings in the High Court. The official liquidator had appointed the appellant's solicitors to continue the proceeding pursuant to s. 236(2)(a) of the CA. The appellant's claim was dismissed in the High Court and the solicitors requested consent to appeal and also filed a notice of appeal in the High Court registry as required by law. It was important to note that the facts of the instant case were not one related to where the sanction was not obtained at all. The appellant here had obtained sanction at the High Court and, subsequently, had applied for sanction to appeal and also had filed the notice of appeal to preserve the right of appeal while awaiting sanction. Sanction was indeed given to the appellant at the time of hearing of the motion but the applicant submitted that it could not be backdated to cover the period where sanction was applied for and was not received. Thus, by a technical argument and in reliance of case laws, the applicant attempted to defeat the constitutional, as well as the statutory, right of appeal of a first instance decision of the High Court from the purview of the Court of Appeal.

Held (dismissing application with costs)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) The letter from the official liquidator stated that the sanction was given under s. 236(2)(a) of the CA for the appointment of solicitor. The scope of the letter, when read with s. 236(2)(a), was very wide. It was not mentioned in s. 236(2)(a) for the solicitor to obtain sanction at every stage, that was to say, even for purpose of appeal. It may not be appropriate for the court to read into a section or the letter of sanction to deprive a litigant a constitutional, as well as statutory, right of appeal unless the objection came from the liquidator himself. (para 11)

(2) Section 236 does not strictly prohibit an interested party in the company to file a notice of appeal to preserve the right to appeal at the time the decision was made in a civil action, notwithstanding that the company was wound up in another winding-up petition. If there is an irregularity, it may be cured by order of court. Splitting of hairs arguments by way of technicalities on such issues do not promote justice as envisaged by the Federal Constitution as well as the rule of law. Any decision falling into the traps of technicalities not only leads to miscarriage of justice, but also the confidence of the public in the administration of justice. (para 13)

(3) The general jurisprudence is that an appeal to the Court of Appeal from the original jurisdiction of the High Court is one of right and the Court of Appeal should be slow to deprive a prospective appellant in exercising the constitutional as well as statutory right of appeal. In addition, the decision of the High Court is subject to the scrutiny of the Court of Appeal pursuant to s. 69 of the CJA. Any legislation or case laws which attempts to deprive the Court of Appeal in exercising its jurisdiction, could not be sustained unless there were good reasons. There is strictly no provision in the CA to deprive an appeal to the Court of Appeal, save that the procedural mechanism to sustain the appeal must be complied with. (para 22)

(4) It was not in dispute that, at the time of decision in the High Court, there was already a sanction granted. The letter from the liquidator did not *per se* restrict the sanction only to work to be done in the High Court. The sanction here was given under s. 236(2)(a) without any caveat by the liquidator. That should be sufficient to proceed to exhaust all remedies in the suit. The authorised solicitor had filed a notice of appeal to appeal to the Court of Appeal, in the High Court itself, and subsequently had also obtained sanction to proceed with the appeal in the Court of Appeal. This was not a case where no sanction was obtained at all and very importantly there was no evidence from the liquidator to say that he was not giving consent for the appellant to proceed with the appeal. Thus, there was no merit to grant this motion. (paras 22, 25 & 26)

***Bahasa Malaysia** Headnotes*

Responden ('pemohon'), melalui lampiran 7, memfailkan notis usul untuk membatalkan rayuan perayu atas alasan bahawa tiada sanksi diberikan oleh pelikuidasi rasmi. Pemohon bergantung pada s. 236(2)(a) Akta Syarikat 1965 ('AS'). Perayu telah digulung selepas permulaan prosiding Mahkamah Tinggi. Pelikuidasi rasmi telah melantik peguam-peguam perayu untuk meneruskan prosiding menurut s. 236(2)(a) AS. Tuntutan perayu telah ditolak oleh Mahkamah Tinggi dan peguam-peguamnya meminta kebenaran untuk merayu dan juga untuk memfailkan notis rayuan dalam pendaftaran Mahkamah Tinggi, seperti yang dikehendaki undang-undang. Adalah penting untuk menyatakan fakta kes ini bukan berkaitan kebenaran tidak diperoleh langsung. Perayu di sini telah memperoleh kebenaran di Mahkamah Tinggi dan seterusnya telah memohon kebenaran merayu dan juga telah memfailkan notis rayuan untuk mengekalkan hak rayuannya sementara menunggu kebenaran. Kebenaran telah diberikan kepada perayu pada masa perbicaraan usul tetapi hujahan pemohon adalah bahawa ini tidak boleh mengundurkan tarikh untuk meliputi tempoh semasa sanksi dipohon dan tidak diterima. Oleh itu, melalui hujahan teknikal dan bergantung pada kes undang-undang, pemohon cuba mengatasi hak perlembagaan dan statutori rayuan keputusan Mahkamah Tinggi pertama daripada skop Mahkamah Rayuan.

Diputuskan (menolak permohonan dengan kos)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Surat pelikuidasi rasmi menyatakan bahawa kebenaran telah diberikan bawah s. 236(2)(a) untuk pelantikan peguam. Skop surat apabila dibaca bersama-sama s. 236(2)(a) adalah luas. Tidak disebut dalam s. 236(2)(a) agar peguam memperoleh kebenaran di setiap peringkat, walaupun untuk tujuan rayuan. Mungkin tidak sesuai untuk mahkamah membaca satu-satu seksyen atau surat kebenaran menafikan pelitigasi hak perlembagaan, dan juga hak statutori rayuan, melainkan bantahan datang daripada pelikuidasi sendiri.

(2) Seksyen 236 tidak melarang pihak yang berkepentingan dalam syarikat memfailkan notis rayuan untuk mengekalkan hak rayuan pada masa keputusan dibuat dalam guaman sivil, walaupun syarikat digulung dalam petisyen penggulungan lain. Jika terdapat ketidakaturan, ini boleh dipulihkan melalui perintah mahkamah. Hujahan-hujahan yang melalui isu-isu teknikal sedemikian tidak memupuk keadilan seperti yang dibayangkan oleh Perlembagaan Persekutuan dan juga *rule of law.* Apa-apa keputusan yang terperangkap oleh isu-isu teknikal tidak hanya membawa pada ketidakadilan, tetapi juga ketidakyakinan pihak awam dalam pentadbiran keadilan.

(3) Perundangan am adalah bahawa rayuan ke Mahkamah Rayuan daripada bidang kuasa asal Mahkamah Tinggi adalah satu hak dan Mahkamah Rayuan harus enggan menafikan perayu melaksanakan hak perlembagaan serta statutori rayuan. Tambahan lagi, keputusan Mahkamah Tinggi tertakluk pada pemerhatian Mahkamah Rayuan bawah s. 69 AMK. Mana-mana undang-undang atau kes undang-undang yang cuba menafikan Mahkamah Rayuan daripada melaksanakan bidang kuasanya, tidak boleh dipertahankan kecuali jika terdapat alasan-alasan kukuh. Tiada peruntukan dalam AS yang menafikan rayuan kepada Mahkamah Rayuan, kecuali mekanisme tatacara mengekalkan rayuan harus dipatuhi.

(4) Tidak dipertikaikan bahawa pada masa keputusan Mahkamah Tinggi, sudah terdapat kebenaran diberi. Surat pelikuidasi tidak *per se* menyekat sanksi untuk berfungsi hanya di Mahkamah Tinggi. Sanksi di sini diberikan bawah s. 236(2)(a) tanpa apa-apa kaveat oleh pelikuidasi. Ini mencukupi untuk meneruskan dan untuk menggunakan semua remedi dalam guaman. Peguam yang diberi kuasa telah memfailkan notis rayuan kepada Mahkamah Rayuan, di Mahkamah Tinggi, dan seterusnya telah memperoleh sanksi untuk meneruskan rayuan di Mahkamah Rayuan. Ini bukan kes kebenaran tidak diperoleh langsung dan tiada keterangan daripada pelikuidasi untuk menyatakan bahawa dia tidak memberi kebenaran kepada perayu untuk meneruskan rayuan. Oleh itu, tiada merit untuk membenarkan usul ini.

Case(s) referred to:

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 FC ***(refd)***

Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd [2012] 10 CLJ 88 CA ***(dist)***

In Re Taylor (A Bankrupt) [2007] 2 WLR 148 ***(refd)***

Kenanga Investment Bank Bhd v. Swee Joo Bhd & Ors And Another Appeal [2017] 1 LNS 2086 CA ***(refd)***

National Union of Bank Employees v. Director General of Trade Unions & Anor [2015] 10 CLJ 62 CA ***(refd)***

Small Medium Enterprise Development Bank Malaysia Bhd v. Blackrock Corporation Sdn Bhd & Ors [2017] 9 CLJ 45 CA ***(dist)***

Winstech Engineering Sdn Bhd v. ESPL (M) Sdn Bhd [2014] 2 CLJ 1 FC ***(dist)***

Legislation referred to:

Companies Act 1965, ss. 236(2)(a)
Courts of Judicature Act 1964, ss. 51, 69
Evidence Act 1950, s. 57

Companies Act 1956 [Ind], s. 457

Other source(s) referred to:

Ramaiya, *The Companies Act*, 11th edn, p 1220

For the appellant - Dennis Xavier & Sakthyvell Saminathan; M/s K Kulasekar & Assocs

For the respondent - Sean HM Yeow, Aric Wong Fong Chin & Andrea Chew Mei Ying; M/s Lee Hishammuddin Allen & Gledhill

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The applicant/respondent by way of encl. 7, has filed a notice of motion to strike out the appellant's appeal solely on the ground that there was no sanction by the official liquidator. The grounds in the notice of motion *inter alia* read as follows:

(1) The appellant was wound up on 11.3.2016;

(2) The appellant has not sought for and/or obtained the necessary sanction from the Official Receiver to file this appeal;

(3) In all circumstances, the appellant has no *locus* to file this appeal, the appeal an abuse of process and ought to be struck out.

[2] The applicant relies on s. 236(2)(a) of the Companies Act 1965 (CA 1965) as well as a number of cases namely: (i) *Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd* [2012] 10 CLJ 88; [2013] 1 MLJ 406, 413, 415 CA; (ii) *Winstech Engineering Sdn Bhd v. Espl (M) Sdn Bhd* [2014] 2 CLJ 1; [2014] 3 MLJ 1, 7, FC; (iii) *Small Medium Enterprise Development Bank Malaysia Bhd v. Blackrock Corporation Sdn Bhd & Ors* [2017] 9 CLJ 45; [2017] 6 MLJ 116, 125, CA; (iv) *In Re Taylor (A Bankrupt)* [2007] 2 WLR 148; and *inter alia* the submission reads as follows:

5. Pursuant to section 236(2)(a) CA 1965, a wound up company requires sanction from its appointed liquidator to commence or to continue with any action or legal proceedings.

6. In the case of *Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd* [2013] 1 MLJ 406, 414, 415 CA, this Honourable Court held:

[14] ... An action filed by the appellant without any leave from the official assignee (as liquidator) or the court or filed by the appellant without having any *locus standi* to do so in law is clearly illegal and invalid. The said action ought to be struck out.

[18] ... We are of the view that the action by the appellant against the respondent should be struck out on the ground of failure on the part of the appellant to obtain prior leave or sanction from either the official assignee as liquidator or the court under s. 233(2) of the Companies Act 1965.

A [7] Based on the official receiver's letter dated 6 April 2018 to the respondent, it is clear that the appellant did not have sanction from the official receiver when it filed this appeal on 29 November 2017. As such, this Appeal which is filed without *locus standi* is clearly illegal and invalid, and ought to be struck out.

B Subsequent Sanction Not Retrospective

[8] The appellant claims that it had on 26 June 2018 obtained sanction to file this Appeal.

[9] With respect, it is trite that the sanction obtained after the filing of the Appeal cannot apply retrospectively. This finding was clearly set out C by this Honorable Court in the case *Hup Lee*, and it was affirmed and applied by the Federal Court in the case of *Winstech Engineering Sdn Bhd v. Espl (M) Sdn Bhd* [2014] 3 MLJ 1, 7, FC:

> [19] As such, we find no reason to depart from the decision of the Court of Appeal in *Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd* [2012] 10 CLJ 88; [2013] 1 MLJ 406, which D this court refused leave to appeal on 19 September 2013. To recapitulate, in the above case, *inter alia*, it was held that:
>
> (i) The sanction granted under s. 236(2)(a) of the Companies Act 1965 to bring, defend any action or other legal proceedings in the name or on behalf of the company does not have a E retrospective effect.

[10] The appeal is clearly unsustainable as a wound up company has no capacity to institute the action from the beginning - *Small Medium Enterprise Development Bank Malaysia Bhd v. Blackrock Corp Sdn Bhd & Ors* [2017] 6 MLJ 116, 125, CA, *In Re Taylor (a bankrupt)* [2007] 2 WLR 148, F 179.

[11] In all circumstances, it is clear that the appellant did not have *locus* to file this appeal. There was no sanction granted by the official receiver when the appeal was filed on 29.11.2017. Naturally, the appeal is void *ab initio* and ought to be struck out.

G **Preliminaries**

[3] It is important to note that the facts of the instant case are not one related to where the sanction was not obtained at all. The appellant here had obtained sanction at the High Court and subsequently had applied for sanction to appeal and also had filed the notice of appeal to preserve the right H of appeal while awaiting sanction. Sanction was indeed given to the appellant at the time of hearing of the motion but the learned counsel for the applicant says that it cannot be backdated to cover the period where sanction was applied for and was not received. Thus, by a technical argument and in reliance of case laws, the applicant attempts to defeat the constitutional as I well as the statutory right of appeal of a first instance decision of the High Court from the purview of the Court of Appeal. The argument is placed without appreciating the dominant powers vested in the Court of Appeal to

rehear all matters of the High Court and make any orders as the justice of the case may require, notwithstanding that there was not even an appeal by one party to that issue. (See *Kenanga Investment Bank Berhad v. Swee Joo Berhad & Ors And Another Appeal* [2017] 1 LNS 2086)

[4] Cases in this area of law which have not considered the dominant provision of s. 69 may stand *per incuriam*. Section 69 of the Courts of Judicature Act 1964 (CJA 1964) reads as follows:

> 69. (1) Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.
>
> (2) The further evidence may be given without leave on interlocutory applications, or in any case as to matter which have occurred after the date of the decision from which the appeal is brought.
>
> (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.
>
> (4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.
>
> (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties although the respondents or parties have not appealed from or complained of the decision.

[5] In addition, when issues related to the Federal Constitution arise, judicial precedent becomes secondary as per the words of HRH Raja Azlan Shah as observed in the case of *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98.

[6] Further, statutes, rules of court, etc cannot be read in isolation. It must be read to advance a purposive approach and reach a harmonious construction of the relevant statutes as well as the Federal Constitution. Reading statutes in isolation may lead to technical arguments as well as judicial pronouncements to defeat substantive justice inconsistent with the Federal Constitution. (See *National Union of Bank Employees v. Director General of Trade Unions & Anor* [2015] 10 CLJ 62). We will elaborate further in our judgment.

A **Brief Facts**

[7] In the instant case, the appellant was wound up on 11 March 2016 and it was subsequent to the commencement of proceedings in the High Court. The official liquidator had appointed the appellant solicitors to continue with the proceeding pursuant to s. 236(2)(a) of CA 1965. The said letter from the
B official liquidation dated 20 June 2016 reads as follows:

> Tetuan K. Kulasekar Achan & Associate
> No. 2, 3/59, jalan Aman,
> 46000 petaling Jaya,
> Selangor Darul Ehsan.
>
> C
> Tuan,
>
> DALAM MTKL PENGGULUNGAN SYARIKAT
> NO. : WA-28NCC5 25-01/2016
> BER : REEBOK (M) SDN. BHD.
> PER : Pelantikan Peguam di bawah Seksyen 236(2)(a) Akta Syarikat 1965
>
> D
> Saya dengan hormatnya merujuk perkara di atas.
>
> 2. Selanjutnya, Pegawai Penerima dengan ini melantik Tetuan K. Kulasekar Achan & Associate untuk mewakili Reebok (M) Sdn. Bhd. dalam tindakan guaman tersebut seperti dibawah:
>
> E
> Mahkamah Tinggi Kuala Lumpur
> Guaman No. 22NCVC-598-11/2015
>
> Reebok (M) Sdn. Bhd. ... Plaintif
> dan
> CIMB Bank Berhad ... Defendan
>
> F
> 3. Pelantikan peguamcara ini tertakluk kepada syarat-syarat seperti berikut:
>
> (a) Surat aku janji peguam bahawa mereka tidak akan menuntut kepada Pegawai Penerima dan Pelikuidasi ke atas apa-apa kegagalan, kerugian dan apa-apa kos yang terlibat atau yang dikenakan oleh mana-mana pihak yang terlibat dalam guaman dan/atau yang berbangkit daripada guaman
> G tersebut/kos guaman [akujanji peguam bertarikh 3.6.2016 telah diterima];
>
> (b) Pegawai Penerima dan Pelikuidasi tidak akan bertanggungjawab dan tidak boleh dipertanggungkan sama sekali atas apa-apa kegagalan, kerugian dan apa-apa kos yang terlibat atau yang dikenakan oleh mana-mana pihak yang terlibat dalam guaman dan/atau yang berbangkit
> H daripada guaman tersebut/kos guaman.
>
> (c) Segala kos, bayaran dan Iain-Iain perbelanjaan prosiding yang berkaitan dengan kes ini ditanggung penjamin dan tidak boleh dituntut ke atas aset penggulungan syarikat dan/atau Pegawai Penerima dan Pelikuidasi syarikat;
>
> I
> (d) Peguam yang mengendalikan kes hendaklah memaklumkan kepada Pegawai Penerima dan Pelikuidasi perkembangan kes tersebut dari semasa ke semasa secara bertulis;

(e) Sekiranya keputusan Mahkamah dalam tindakan guaman tersebut memihak kepada syarikat, apa-apa wang, pampasan dan faedah yang diterima oleh syarikat hendaklah diserahkan kepada Pegawai Penerima dan Pelikuidasi untuk dimasukkan ke dalam estet syarikat untuk faedah pemiutang-pemiutang.

Sekian, terima kasih.

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah,

t/t

[ABDUL RANI BIN MEGAT KASSIM]
Pengarah Negeri
Jabatan Insolvensi Malaysia
Cawangan Wilayah Persekutuan Kuala Lumpur
b.p. Pegawai Penerima dan Pelikuidasi

[8] The appellant's claim was dismissed in the High Court and the solicitors by a letter dated 27 November 2017 requested consent to appeal and also filed a notice of appeal, very importantly in the High Court registry as required by the law. (See s. 51 CJA 1964). Filing anything in the High Court arguably will be within the sanction provided to the appellant by the liquidator. Cases which had not taken into consideration this point can only be said to be an uninformed decision. Any decision based on uninformed matters relating to rule of law is a reflection of a decision where integrity of the judicial decision-making process has been compromised. It is politely referred to as '*per incuriam*'. A judge by his oath of office is not obliged to subscribe to a judicial precedent on the face of record when it has been compromised by the decision-maker's failure to take into consideration the relevant laws. Support for the proposition is also found in statutes and a number of cases. (See s. 57 of Evidence Act 1950). For example, in *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98; [1981] 1 MLJ 29, HRJ Raja Azlan Shah observed:

> **In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation**. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way - "with less rigidity and more generosity than other Acts" (see *Minister of Home Affairs v. Fisher* [1979] 3 All ER 21). A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: "A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that

A rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms." The principle of interpreting constitutions "with less rigidity and more generosity" was again applied by the Privy Council in *Attorney-General of St Christopher, Nevis and Anguilla v. Reynolds* [1979] 3 All ER 129, 136. (emphasis added).

B

Jurisprudence of Sanctions Pursuant To S. 236(2)(a) In Cases - *Hup Lee, Winstech, Small Medium* - Retrospective Sanctions

[9] Pursuant to s. 236(2)(a) of CA 1965, a wound up company requires C sanction from its appointed liquidator to commence or to continue with any action or legal proceedings.

[10] Section 236(2) of CA 1965 reads as follows:

(2) The liquidator may:

D (a) **bring or defend any action or other legal proceeding in the name and on behalf of the company.**

(b) compromise any debt due to the company other than calls and liabilities for calls and other than a debt where the amount claimed by the company to be due to it exceeds one thousand five hundred ringgit;

E

(c) sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels;

F (d) do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and for that purpose use when necessary the company's seal;

(e) prove rank and claim in the bankruptcy of any contributory or debtor for any balance against his estate, and receive dividends in the bankruptcy in respect of that balance as a separate debt due from the bankrupt and rateably with the other separate creditors;

G

(f) draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business;

H

(g) raise on the security of the assets of the company any money requisite;

(h) take out letters of administration of the estate of any deceased contributory or debtor, and do any other act necessary for obtaining payment of any money due from a contributory or debtor or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall for the purposes of enabling the liquidator to take out the letters of administration or recover the money be deemed due to the liquidator himself;

I

(i) appoint an agent to do any business which the liquidator is unable to do himself; and

(j) do all such other things as are necessary for winding up the affairs of the company and distributing its assets.

(3) *The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.*

(emphasis added)

[11] In the instant case, the letter from the official liquidator states that the sanction is given under s. 236(2)(a) for the appointment of solicitor. The scope of the letter when read with s. 236(2)(a) is very wide. It is not mentioned in s. 236(2)(a) for the solicitor to obtain sanction at every stage, that is to say, even for purpose of appeal. It may not be appropriate for the court to read into a section or the letter of sanction to deprive a litigant a constitutional as well as a statutory right of appeal unless the objection comes from the liquidator himself.

[12] It is trite that once a solicitor is appointed, they have to perform their duty to protect the client's interest at all stages unless the appointment has been revoked or the solicitor discharges from acting according to law. The issue of sanction (if any) will only be material at the date of hearing of the appeal. Any irregularities as to sanction may be cured by direction of the court in the exercise of the court's statutory as well as inherent powers to ensure that constitutional and statutory right of appeal is not defeated by technicalities.

[13] Section 236 does not strictly even prohibit an interested party in the company to file a notice of appeal to preserve the right to appeal at the time the decision was made in a civil action, notwithstanding that the company was wound up in another winding-up petition. If there is an irregularity, it may be cured by order of court. (See s. 236(3) CA 1965). This is so, because of at least two reasons, namely: (i) in practice, it takes more than a month for the liquidator to provide sanction; (ii) it is mandatory for appeal from the High Court to be filed within a month of the decision. If there is an irregularity, it may be regularised by order of the court. Splitting of hairs arguments by way of technicalities on such issues do not promote justice as envisaged by the Federal Constitution as well as rule of law. Any decision falling into the traps of technicalities not only leads to miscarriage of justice, but also the confidence of the public in the administration of justice.

[14] If there is an irregularity in sanction, the court always has power to regularise the proceedings, taking into consideration that an appeal from the High Court as well as the Court of Appeal is a constitutional as well as a statutory right. Procedural skirmishes ought not to prevail, to defeat substantive justice.

[15] In the case of *Hup Lee*, no sanction was obtained at the commencement and/or during the time of proceeding where the company was wound up. The court is unlikely to have dismissed the appeal if the liquidator had provided the sanction and had requested that the irregularity be condoned if there are good reasons to do so. The failure to provide sanction cannot be construed as illegality or nullity but only an irregularity as to the issue of *locus standi* which may be regularised by an order of the court. Support for the proposition is found in a number of the Indian cases which has been reproduced below.

[16] The facts of *Winstech* case are not similar to the present case. The facts of *Winstech* case as summarised by the learned editors of the law journal read as follows:

> The applicant herein was wound up on 4 February 2010 and on the same day the official receiver was appointed as its liquidator. Without obtaining the prior sanction of the official receiver the applicant applied for leave to appeal to the Federal Court on 23 May 2013. The official receiver gave his sanction only on 19 August 2013. The respondent applied for the leave application to be struck out contending that it was void *ab initio* as the applicant did not have *locus standi* to file the application. The respondent said the official receiver's sanction could not operate retrospectively to validate the filing of the application. The applicant, *inter alia*, argued that under the doctrine of ratification the fact that the official receiver had given his sanction cured any defect relating to *locus standi*.

[17] The Federal Court *inter alia* held:

> (1) The sanction given in the Director-General of Insolvency's letter dated 19 August 2013 did not specify that it was to be retrospective. For the doctrine of ratification to apply, the ratification must be clear (see para 20).
>
> (2) There was no application for the official receiver's sanction to be made retrospective. In short, there was no *nunc pro tunc* leave application. There was, therefore, no material before the court to consider and to justify the grant of *nunc pro tunc* leave (see para 23).
>
> (3) The argument that the respondent had not been prejudiced and that no miscarriage of justice had been caused did not arise as the applicant, on its own accord, failed to utilise the enabling provisions of the law to commence the legal proceedings. The court, in law, was not in a position to render assistance to such a litigant.

[18] *Winstech* case cannot be an authority to suggest a retrospective sanction is bad in law as argued in this case. What the Federal Court held was that for retrospective sanction to be valid, it must be clearly stated in the letter by the Director General of Insolvency. This rider imposed by the Federal Court says that the applicant in seeking leave to appeal should have the papers in order to ensure and demonstrate to the apex court that the Director General of Insolvency had in fact given sanction. In a situation of that nature, the Federal Court may have granted an adjournment to obtain the necessary letter reflecting the sanction if an adjournment had been sought.

The facts of that case did not show that an adjournment was requested to regularise the shortcoming. However, the Federal Court did consider the issue related to retrospective sanction and observed:

> [20] It was also argued by the applicant that by applying the doctrine of ratification, a subsequent sanction could ratify the issue of *locus standi*. To see if such doctrine is applicable in this case, it is appropriate to see the actual 'sanction' given. The sanction as per the Director General of Insolvency's letter dated 19 August 2013, did not specify that it is to be retrospective. For the doctrine of ratification to be applicable, the ratification must be clear. Furthermore, in the present case, there is no evidence to show that there is ever any application for the sanction to be retrospective. In *Re Saunders (A bankrupt); Re Bearman (A bankrupt)* [1997] Ch 60; [1997] 3 AJ1 ER 992 Lindsay J, held:
>
> > Given the practical inconveniences I have described and the injustices that can be left without possible remedy if retrospective leave is in no case possible, I share with the Full Bench in Lahore in 1942 the view that, if the section is capable of being read more than one way, there is no doubt which way entails the less injustice and inconvenience. If, as I hold, the words used are in their full historical context fairly capable of bearing more than one meaning, it is legitimate for me to adopt a meaning which gives effect to the statutory purpose, rather than frustrating it, as in my view an inflexible powerlessness to give leave even in the most glaring of cases would do;
> >
> > ... Accordingly, I hold that leave may in appropriate circumstances be given under section 285(3), notwithstanding that the proceedings in question have already been commenced.
> >
> > As for the discretion, I have earlier mentioned that the trustees in bankruptcy do not oppose the granting of leave and that it has been conceded that if the jurisdiction exists the facts are such as to justify a grant of leave *nunc pro tunc* in exercise of the discretion. I am satisfied that that is so and grant such leave.
>
> [21] The issue of prejudice or miscarriage of justice does not arise in the circumstances, as the applicant, on its own accord, had failed to utilise the enabling provisions of the law to commence the impugned legal proceedings. The court, in law, is not in a position to render assistance to such litigant.
>
> [22] Following *Saunders* case, we hold the view that in appropriate circumstances, which has to be proven, leave *nunc pro tunc* may be given under s. 236(2)(a) of the Companies Act subject to the discretion of the courts under s. 236(3) of the Act. Such discretion and control by the court under s. 236(3) is to be read together with s. 226(3) of the Act. This is notwithstanding the fact that the proceedings had already commenced.
>
> [23] As stated earlier in this case there was no application for the sanction to be made retrospectively. In short, there was no *nunc pro tunc* leave application. As such there is therefore no material before this court to consider and to justify a grant of a *nunc pro tunc* leave.

[19] Retrospective sanction is a well accepted jurisprudence in many jurisdiction especially in winding-up proceedings as opposed to bankruptcy proceedings. For example, in India the Indian Companies Act 1956 (ICA 1956) - the power of liquidator is similar to ours but the liquidator himself must obtain consent from the court. The said s. 457 of ICA 1956 which has some similarities to our s. 236(2)(a) reads as follows:

> 457. Powers of liquidator
>
> (1) The liquidator in a winding up by the Court shall have power, with the sanction of the Court:
>
> (a) to institute or defend any suit, prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company.

[20] The learned author Ramaiya (11th ed), *The Companies Act*, p. 1220 observes:

> The sanction of the Court is generally obtained before proceedings are initiated but the Court has jurisdiction to grant the sanction even after commencement of the proceedings, *Loomchand Sait v. Official Liquidator* [1953] 1 MLJ 514: AIR [1953] Mad 595; In re, *London Metallurgical Company* [1897] 2 Ch 262. A general sanction for exercise of the various powers under this section is sufficient, and complaint filed on the basis of such sanction is not invalid. *Mrityunjay v. Provat Kumar*, 56 CWN 18; AIR [1953] Cal 153. It has been held by the Supreme Court that though the section defines the powers which the liquidator may exercise with the sanction of the Court, there is no indication that if the liquidator takes action without a direction of the Court, the action would be illegal or invalid or the proceeding invalidated thereby. *Dr. Sailendra Nath Sinha v. Jasoda,* AIR [1959] SC 51: [1958] 28 Com Cases 609 (SC). The same Court has also held that for a criminal prosecution, no sanction is necessary. *J.M. Akhaney v. State of Bombay* [1956] 2 MLJ 49: AIR [1956] SC 575; *Re Maneckchowk & Ahmedabad Co. Ltd., (In liquidation)* [1983] 53 Com Cases 515 (Guj).
>
> Under the provisions of this Act, the Official Liquidator functions under the directions of the Court. He can institute or defend suits only with the leave of the Court. Being an officer of the court, he is an adjunct to the court and cannot file an appeal against the order of the court. *Official Liquidator v. Golcha Properties (P) Ltd.* [1981] Tax 2561 (Raj).
>
> Sanction obtained without notice to the respondents is not irregular or invalid. *Punjab Finance Private Ltd. v. Mulhara Singh* [1975] 45 Com Cases 254: [1974] Tax LR 1843 (P & H).
>
> The sanction may be general and the liquidator is not required to take detailed directions or directions at every stage of exercise of his powers. *Amba Tannin Pharmaceuticals Ltd. v. Official Liquidator* [1975] 45 Com Cases 457 (Bom.)
>
> In the case of voluntary liquidation sanction of the court is not necessary for the institution or defence of a suit. *P. T. Varghese v. Industrial Bank Ltd.* [1963] 33 Com Cases 262 (Ker).

> For continuing or defending a suit already instituted before the winding-up, no sanction of the Court is necessary, see *Eastern Coat Co. Ltd. v. Sunil Kumar Roy,* [1968] 1 Comp LJ 168: [1969] 39 Com Cases 126 (Cal).

[21] The case of *Small Medium* and the facts of the instant case are not similar. In addition, there was no application to regularise the retrospective sanction. The Court of Appeal held:

> (1) When the writ and the statement of claim was filed on 23 February 2011 in Suit 207, there was no sanction obtained by the first respondent. Sanction was only obtained on 3 June 2015, post filing of the writ and statement of claim. In view of the fact that the sanction was only obtained after the suit had been filed, the first respondent had no capacity to institute Suit 207. The sanction obtained after the filing of Suit 207 could not be made retrospective.

[22] We have read the application and all affidavits filed. We thank the learned counsel for the able submissions. After giving much consideration to the submissions of the learned counsel for the respondent, we took the view that there is no merit to grant this motion. Our reasons *inter alia* are as follows:

(i) The general jurisprudence is that an appeal to the Court of Appeal from the original jurisdiction of the High Court is one of right and the Court of Appeal should be slow to deprive a prospective appellant in exercising the constitutional as well as statutory right of appeal.

(ii) In addition, it must be noted that the decision of the High Court is subject to the scrutiny of the Court of Appeal pursuant to s. 69 of the CJA. Any legislation or case laws which attempts to deprive the Court of Appeal in exercising its jurisdiction, cannot be sustained unless there are good reasons.

(iii) There is strictly no provision in the Companies Act 1965, to deprive an appeal to the Court of Appeal, save that the procedural mechanism to sustain the appeal must be complied with.

[23] The Companies Act as well as case laws do not permit an action to be commenced after a winding-up order without first obtaining the sanction from the liquidator. If sanction has not been obtained, the commencement of the proceedings will be irregular in relation to *locus standi* and will have to be struck out, unless a retrospective sanction is approved by the court.

[24] If an action has been commenced, and subsequently the company has been wound up, a sanction needs to be obtained. In such a case, retrospective sanction is relevant.

A **[25]** In the instant case, it is not in dispute that at the time of decision in the High Court, there was already a sanction granted. The letter from the liquidator does not *per se* restrict the sanction only to work to be done in the High Court. The sanction here is given under s. 236(2)(a) without any caveat by the liquidator. That should be sufficient to proceed to exhaust all remedies
B in the suit.

[26] In the instant case, the authorised solicitor has filed a notice of appeal to appeal to the Court of Appeal, in the High Court itself, and subsequently has also obtained sanction to proceed with the appeal in the Court of Appeal. This is not a case where no sanction was obtained at all and very importantly
C there is no evidence from the liquidator to say that he is not giving consent for the appellant to proceed with the appeal. In consequence, we take the view that the application has no merit and the application is dismissed with costs of RM3,000 and with a further order that the said sum to be paid directly to the Director General of Insolvency.

D We hereby ordered so.

E

F

G

H

I